Supreme Court, U.S.
FILED
APR 19 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1980

No. 79-1652

ALICE MILLER,

Petitioner,

vs.

PATRICIA ROBERTS HARRIS, in her official capacity as Secretary of the Department of Housing and Urban Development, and Department of Housing and Urban Development,

Appellees.

PETITION FOR WRIT OF CERTIORARI.

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Appellees.

PETITION FOR WRIT OF CERTIORARI.

Introductory Paragraph.

Alice Miller, your Petitioner, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on December 10, 1979, following denial of Petitioner's timely Petition for Rehearing therein on January 21, 1980.

Opinions Below.

None of the opinions concerning this matter has been published. The following opinions and orders are relevant and are reproduced in the Appendix as indicated: The Judgment and Opinion of the Court of Appeals for the District of Columbia Circuit of December 10, 1979 is reported at

610 F.2d 1000 and is appended as Appendix I; the Order denying Petitioner's Petition for Rehearing is appended as Appendix II. The District Court's opinion, dated September 26, 1978, is reproduced as Appendix IX.

Two opinions from the Ninth Circuit Court of Appeals, regarding earlier proceedings related to the within matter, likewise are unpublished. The first opinion is dated March 17, 1975 and is reproduced herein as Appendix III; the second opinion was reported at 551 F.2d 313 and is reproduced as Appendix IV.

The Notice to Counsel from the Court of Appeals of October 26, 1979 setting the case for oral argument is reproduced as Appendix V. The Order of the Court of Appeals of November 19, 1979 approving Petitioner's motion for counsel at oral argument is reproduced as Appendix VI. The Order of the Court of Appeals of November 23, 1979, withdrawing, *sua sponte*, Petitioner's (and her counsel's) privilege to orally argue her case is reproduced as Appendix VII.

Jurisdiction.

The Judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on December 10, 1979. A timely Petition for Rehearing was denied on January 21, 1980. The jurisdiction of the Supreme Court is invoked under the provisions of 28 U.S. Code, Sections 1254(1); 1651 and 2106 and Rule 19(b) of the Revised Rules of the United States Supreme Court.

Questions Presented.

1. Does Rule 11(d), District of Columbia Circuit Rules of Court, violate the protections and guarantees afforded by the provisions of Rules 34 and 47 of the Rules of Appellate

Procedure by depriving Petitioner of her statutory right to present oral argument on appeal?

2. Was Petitioner unlawfully deprived of her right to have her appeal "heard and determined" as provided by 28 United States Code §46(c) when the Court of Appeals *sua sponte*, and without opportunity to be heard thereon, withdrew Petitioner's right to orally argue her appeal?

3. Where Petitioner is seeking a Declaration of her Rights as to whether a Statute of Limitations is applicable to her case or whether that statute has been tolled, does the trial Court err in dismissing the Complaint as opposed to declaring her rights, especially in the absence of any affidavit in opposition to her position?

4. Where the only basis for a dismissal on motion is the Statute of Limitations, and the Court of Appeals for the Ninth Circuit has stated that an issue of fact which, if true, would require dismissal of this pending case as being premature, isn't Petitioner deprived of an opportunity to have her claims presented if she thereafter is prevented from alleging such new facts, if true, which would bring her within the holdings of the Ninth Circuit?

5. Where the reason given for dismissal of a Complaint is that the Statute of Limitation has run, and the District Court applies a period applicable to Civil Rights Claims (three years), but there also is a Contract Claim with an applicable six year period of limitations which does not begin to ripen until after securing relief asked for by the Declaratory Relief portions of the Complaint and neither the District Court nor the Court of Appeals considered or ruled upon these claims, isn't Petitioner deprived of her right to a fair hearing, especially where there has never been an affidavit filed in opposition to her position?

Statutes Involved.

The following statutory provisions are set forth in the Appendix [collectively at Appendix VIII]: Title 28 United States Code §46; Title 28 United States Code, Federal Rules of Appellate Procedure, Rules 34 and 47; Rules of the United States Court of Appeals for the District of Columbia, Rule 11; Title 28 United States Code §2401(a); California Code of Civil Procedure, Section 338(1).

Statement.

On January 20, 1971, Petitioner commenced proceedings in the United States District Court for the District of Columbia, alleging, in effect, that she had been injured by reason of the Respondents' denial of her right to appeal her discharge from employment with the Housing Authority of the City of Los Angeles ("HACLA") and that her dismissal was in violation of her civil rights, as well as other matters. Upon the Court's own motion the matter was transferred to the United States District Court for the Central District of California in December 1971.

Subsequently, following a dismissal upon application of the Government (unsupported by affidavit), the Court of Appeals for the Ninth Circuit (reversing a judgment of dismissal of her Complaint) held that Petitioner's claims were "cognizable under 42 U.S.C. Section 1983 and 28 U.S.C. Section 1343(3); her fourth claim is cognizable under 42 U.S.C. Section 1985(3) and 28 U.S.C. Section 1343(1)." Appendix III, p. 3. The Court of Appeals also held that other claims appeared to have been stated in Petitioner's Complaint. *Id.*

Promptly following remittitur, the Government again moved to dismiss the Complaint, this time upon the grounds that the Statute of Limitations as embodied in California Code of Civil Procedure, Section 338(1), barred the action.

Again the motion was presented without affidavit and the motion was granted promptly without affording Petitioner any opportunity to amend her pleadings consistent with the findings of the Ninth Circuit.

The judgment of dismissal was sustained on February 24, 1977, on the basis of California's Code of Civil Procedure, Section 338(1); Petition for writ of certiorari was denied February 21, 1978, 434 U.S. 1065, 98 S.Ct. 1241, 55 L.Ed.2d 766 and Petition for Rehearing denied April 17, 1978, 435 U.S. 981, 98 S.Ct. 1632, 56 L.Ed.2d 74.

Petitioner then filed a new complaint with the United States District Court for the District of Columbia on June 22, 1978 setting forth her claims which she contends would be subject to the six year statute (and its tolling) as provided by 28 U.S.C. §2401(a). Upon motion of the Government, the Complaint was ordered dismissed and that judgment was sustained by the Court of Appeals upon a "res judicata" effect of the opinion by the Ninth Circuit (which dealt only with matters subject to the three-year statute and not those now included within the six-year statute).

On October 26, 1979 Petitioner's appeal from the order dismissing her complaint was scheduled for oral argument on Monday, December 3, 1979. [App. V.] On November 19, 1979 the Court of Appeals ordered that Petitioner "and counsel may appear on her behalf at argument". [App. VI.] Then, on November 23, 1979, the Court of Appeals ordered, *sua sponte*, that the case would be considered and decided without oral argument. [App. VII.]

The decision below was affirmed on December 10, 1979. App. I.

Statement of Facts.

Petitioner had been employed as a public employee of the Housing Authority of the City of Los Angeles ("HACLA") when respondents elected to exercise their

statutory right under 42 U.S.C. §1421(a) (U.S. Housing Act of 1937) to take possession of the local housing authority in the name of and on behalf of the federal Government on April 11, 1963, which status continued through March 31, 1971.

During this "possession" HACLA represented itself as a federal agency.

On June 8, 1965, Petitioner was discharged as a permanent employee of HACLA. Permanent status entitled her to all rights and privileges of the personnel rules and regulations then in existence, both as a statutory and as a contractual right. The personnel rules and regulations included specific procedures for the right of a discharged employee to appeal the discharge action.

However, in this instance, on December 28, 1965 respondents advised Petitioner that her right of appeal would be withheld "until such time as it can be shown the federal Government's interest is involved".

Ever since, Petitioner has been engaged in attempting to demonstrate the Government's interest, and, because of the rulings by respondents, has never been afforded a right to an administrative appeal. The pursuit of her administrative right to an appeal has brought Petitioner to federal court as the forum by which "it can be shown the federal Government's interest is involved" so that she finally may receive the administrative appellate remedy to which she is entitled.

The Complaint below seeks, among other relief, a declaration of Petitioner's rights with respect to whether or not a federal statute of limitations, which is different than (and twice as long as) that which was before the Ninth Circuit, is applicable to this particular action and whether, under fairly well defined principles, whether or not the time within which she might initiate her action has commenced to run.

By dismissing her Complaint, without opportunity to amend or be heard, Petitioner has been deprived of both a declaration of her rights and of an opportunity for access to the Courts.

REASONS FOR GRANTING THE WRIT.

The Circuit Court's Sua Sponte Order Denying Petitioner the Right to Oral Argument, Only Four Days After Granting Petitioner Leave for Her Counsel to Appear on Her Behalf at Oral Argument, Exceeded the Jurisdiction of the Circuit Court and Deprived Petitioner of the Right to Oral Argument as Guaranteed by Statute and Court Rule.

After many years of struggling in the federal courts to secure the right of administrative appeal from her discharge by HACLA, Petitioner now is faced with the Court of Appeals, itself, disfranchising her from a meaningful right of appeal by utilization of rule which, itself, is contrary to law.

Certainly, above all else, the judiciary must oblige itself to comply with statutory mandates. Where the judiciary permits itself to indulge in rules of convenience, contrary to rules of law, then the entire system commences to evaporate from within.

Many of the issues remaining undecided here might well have been decided had Petitioner been afforded an opportunity to argue her case before the Court of Appeals instead of having it determined in a summary fashion without opportunity to argue.[1]

The right to oral argument is an inherent and necessary adjunct to the very basic principles of appellate advocacy, itself. It has been part and parcel of the appellate process

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[1]Petitioner had applied to the Court of Appeals for leave to have her case argued by counsel of her choice. On November 19, 1979 the Court of Appeals ordered that "If appellant desires to hire counsel to represent her, she, of course, has that right and counsel may appear on her behalf at argument provided that the appearance of counsel is entered no later than five days prior to the date set for the argument." A mere four days later the Court of Appeals effectively revoked that order by ordering that there would be no oral argument at all.

from time immemorial, and often aids the appellate courts in clarifying matters of uncertainty. (How many opinions of this very Court reflect upon "concessions" and "clarifications" provided by counsel at oral argument as having been helpful in arriving at a proper decision?)

We need not restrict ourselves only to Common Law concepts of appellate advocacy as the basis for oral argument. Indeed, such rights are embodied in our own federal statutory scheme of the appellate process and the District of Columbia Circuit's Rule, allowing that court to summarily deprive an appellant of the right to oral argument, is directly violative of superior federal statute and controlling Rules of Court.

Rule 34, Rules of Appellate Procedure, guarantees the right of oral argument to an appellant. The Rule leaves no basis for a junior rule to disregard this basic element. Thus, the following statements (*inter alia*) are found in Rule 34:

> (a) "The clerk shall advise all parties of the time and place at which oral argument will be heard."
>
> (b) "Unless otherwise provided by rule *for all cases or for classes of cases*, each side will be allowed 30 minutes for argument." [Emphasis added. The District of Columbia Circuit's Rule is not applicable "for all cases or for classes of cases," but is on a case-by-case determination without opportunity to be heard.]
>
> (c) "The appellant is entitled to open and conclude the argument. The opening argument shall include a fair statement of the case."
>
> (e) "If the appellee fails to appear to present argument, *the court will hear argument* on behalf of the appellant, if present." [Emphasis added.]

(f) "By agreement of the parties, a case may be submitted for decision on the briefs, but the court may direct that the case be argued."

Rule 47 prohibits the Courts of Appeals from making any rules which are in conflict with the Rules of Appellate Procedure:

> "Each court of appeals . . . may from time to time make and amend rules governing its practice *not inconsistent with these rules*. . . ." [Emphasis added.]

The authority cited by the Court of Appeals, in revoking the right of oral argument, is its own District of Columbia Circuit Rule 11(d) which purports to allow the Court, itself, to determine *sua sponte*—as was done below—to deprive a litigant of the right to oral argument. Rule 11(e) requires notification of the determination be given by the clerk (10 days notice was given in this case, by mail) and further states that motions to restore to the argument calendar ordinarily will not be entertained.

Title 28 United States Code, Section 46 provides that every appeal SHALL BE HEARD by the division (of three judges) assigned (paragraph (b)): "Such divisions shall sit at the times and places *and hear the cases and controversies assigned as the court directs*." [Emphasis added.] Subparagraph (d) thereof requires that a majority of the judges is required to *hear* and determine the matter.

By utilizing a local rule which is in direct conflict with a Federal Rule of Procedure, and a Federal Statute, the Court of Appeals acted beyond its jurisdiction and deprived

Petitioner of a necessary and fundamental utility in the appellate process.[2]

The importance of oral argument, in this very case, cannot be over emphasized. The memorandum decision of the Court of Appeals reflects that it has not considered the merits of the very long and complicated history of this case, but merely concluded that the opinion of the Ninth Circuit must have been *res judicata* since it dealt with a similar issue—the statute of limitations. Had oral argument been permitted, the Court could have been guided to the fact that while the "Statute of Limitations" was, indeed, an issue, just as certainly a different Statute of Limitations than that previously ruled upon was involved and, also as observed by the Court of Appeals, the issue of tolling may very well have been different with a federal statute than with a state statute. The Court could have been reminded that a ruling upon a statute of limitations is not *res judicata* upon the merits, but only upon the application of the particular statute to the particular cause of action. See, *Coppedge v. United States* (1962) 369 U.S. 438, 446-447, 82 S.Ct. 917, 8 L.Ed.2d 21, 29:

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[2]This Court appears to have addressed the issue of oral argument only on one prior occasion. *Price v. Johnston*, 334 U.S. 266, 68 S.Ct. 1049, 92 L.Ed. 1356. There the Court held that oral argument is not an essential ingredient of due process. We submit, however, that where the right of oral argument specifically is reserved to the litigant by statute and court rule, that the deprivation thereof "*sua sponte*" constitutes a denial of due process as well as an act in excess of jurisdiction. More recently, the California Supreme Court dealt with the identical question, and after reviewing the statutory and Court Rules authority (quite similar to the Rules cited above, although based on California's own Constitution, statutes and court rules) ruled that a Court of Appeal acts outside of its authority when it summarily affirms a judgment without holding oral argument upon the issues presented. *People v. Brigham* (Sept. 7, 1979) 25 Cal.3d 283, 599 P.2d 100, 157 Cal.Rptr. 905.

"[I]t is our duty to assure to the greatest degree possible, within the statutory framework for appeals created by Congress, equal treatment for every litigant before the bar." Footnote 13 omitted.

Petitioner's Efforts to Secure a Declaration of Her Right to Pursue an Appeal From Her Discharge as an Employee of HACLA, and of a Tolling of the Statute of Limitations With Respect to That Right, Is a Controversy Within the Scope of 28 U.S.C. §2201 Which Should Not Have Been Dismissed Without Affording Petitioner at Least One Opportunity to Amend Her Pleadings, if Required, or Some Showing, Supported by Affidavit, That Her Claims of Tolling and of a Different Applicable Statute Are Without Merit.

The action below seeks, *inter alia*, a declaration of Petitioner's rights to secure an administrative appellate review of her discharge as an employee of HACLA. She seeks to establish that the six-year statute of limitations (28 U.S.C. §2401(a)) for contracts is applicable to at least part of her claim and that notwithstanding the decision by the Ninth Circuit Court of Appeals with respect to her earlier litigation, another cause of action exists on her behalf which is subject to another and longer statute of limitations which had not yet elapsed either by reason of tolling or by reason of the fact that her rights had not ripened.

To this point of time, Petitioner never has been afforded an opportunity to present her case upon the merits of any cause of action (although a Court of Appeals determined that she had stated several) and never has been opposed with a sworn statement from the Government (respondents), although she has filed affidavits which, standing uncontradicted, provide the basis for tolling of the statute and that

her rights have not yet ripened, so that the statute could not yet commence to run.

Petitioner can state a claim for relief, and has stated a basis for tolling of a statute of limitations upon both the claim and the statute, neither of which previously was decided by the Ninth Circuit. She should be permitted to amend her pleadings, if that should be required, *at least once* before being barred from entry to the judicial process. (As observed by the District Court below, in granting the motion to dismiss, a judgment based upon a "statute of limitations is not a judgment on the merits to which the doctrine of *res judicata* applies when, as in this case, the statute of limitations bars only the remedy and does not destroy the federal cause of of action. *Williamson v. Columbia Gas & Electric Corp.*, 186 F.2d 464, 466 (3d Cir. 1950), *cert. denied*, 341 U.S. 921 (1951); *Liken v. Shaffer*, 141 F.2d 877, 882 (8th Cir. 1944), *cert. denied*, 323 U.S. 756 (1944).")

Certainly she is entitled to a declaration of her rights in the circumstances, even if the declaration should be against her position, especially where a Court of Appeals already has ruled in favor as to having presented a factual basis for recovery.

Since Petitioner Is Seeking to Compel the Right of Appellate Review in Administrative Proceedings, It Appears That the Statute of Limitations Upon Her Civil Rights Claims Does Not Commence to Run Until Her Grievances Have Been Heard in the Administrative Proceedings.

Among Petitioner's relief being sought below is a declaration of her right to receive an administrative appeal. Even if the final result should be contrary to her position, nonetheless she is entitled to such a declaration.

The dismissal of her Complaint, however, assumes that all of her claims are barred by California Code of Civil Procedure, Section 338(1). Such is not the case. Section 338(1) would only bar her civil rights claims, if they had accrued. It does not touch upon the question of her claim of right to seek review of her discharge within an administrative agency of the United States Government.

Further, her claim to a right of administrative review of her discharge does not appear to be subject to the time limitations set out in 28 U.S.C. §2401(a), as such a demand does not appear to be a "Civil action" within the meaning of the statute, in that an administrative review proceeding is not, in the truest sense, an action against the United States. See, *e.g., Southern California First Nat. Bank v. United States* (D.C. Cal. 1969) 298 F.Supp. 1249; *Anderson v. U.S. Atomic Energy Commission* (7th Cir. 1963) 313 F.2d 313; see, especially, *Oppenheim v. Campbell* (C.A.D.C. 1978) 571 F.2d 660, 187 U.S.App.D.C. 226 (civil service employee's action challenging denial for civil service retirement credit not a "civil action" within meaning of §2401, although Government's failure to rehire him was).

Thus, Petitioner finds herself in a Catch 22 situation. Her right to a cause of action does not accrue until her administrative appeal has been determined; she cannot seek a declaration of her right to such an administrative appeal since the time to sue upon the damages which might have flowed, had she been afforded such an appeal, has expired. (See, *e.g.*, the opinion of the Ninth Circuit [App. IV] to the effect that if she is right, the action pending there should be dismissed.) *Cf. Walker v. United States* (D.C.Ga. 1977) 438 F.Supp. 251 (period of limitations does not begin to run until the right to the cause of action accrues.)

This Court Has Ruled, Unanimously, That the Statute of Limitations (28 U.S.C. §2401(a)) Does Not Commence to Run Until a Board of Appeals Finally Rules Upon the Claim; Such Is Precisely the Matter Presented in This Petition.

This Court ruled in *Crown Coat Front Co. v. United States* (1967) 386 U.S. 503, 87 S.Ct. 1177, 18 L.Ed.2d 256 that where a contractual claim was the subject of an administrative appeal review, the six-year period prescribed by Section 2401 would not commence to run until the appeal was finally determined.

In the case presented by Petitioner, she is contending that she has never been able to secure her right of administrative appeal and, by reason thereof, the statute could not commence.

Each of the courts below has observed (as finally embodied in the opinion of the Ninth Circuit, App. IV, p. 2) that Petitioner's claims probably were premature and she should not be in court until she had received her appellate rights. Yet each of the dismissals has been based upon statute of limitations, and no reference has ever been made to her request for a declaratory judgment that she is entitled to an administrative appellate hearing.

In view of the fact that each dismissal has been predicated upon unsworn documents, and only upon a narrow issue raised by the pleadings (*i.e.*, Petitioner's Civil Rights claims), each of the Courts below has overlooked Petitioner's other claims which are subject to different periods of limitations.

Among the issues presented to the lower courts was the fact that the *contract* existing between Petitioner and the Government included a requirement that she be afforded the right of appeal and review from a discharge of employment.

Until that right of appeal was exercised, her right to sue could not accrue. The Government has refused to grant her that right of appeal, and has actively sought to conceal that right from her (as alleged in the Complaint below).

The Government's position that Petitioner ought to have brought suit at an earlier time is precisely contrary to what this Court found to be the restriction in *Crown Coat Front Co.*:

> "The Government suggests that the contractor may easily avoid such untoward results by the timely filing of a protective suit which could remain inactive pending the conclusion of administrative proceedings. But the contractor is not legally entitled to ask the courts to adjudicate his claim as an original matter. Nor can he sensibly ask the courts to review a decision which has not yet been made. He cannot, with honesty, make the necessary allegations to support an action for review until the administrative process is completed and the agency decision known." 386 U.S. at 515, 18 L.Ed.2d at 265.

Without an Opportunity to Present Facts Upon Which to Make a Determination as to Whether or Not the Statute of Limitations Has Even Commenced, Let Alone Expired, the Lower Courts Are Foreclosing Petitioner From a Meaningful Entry to a Judicial Determination of Her Rights in the Circumstances.

Petitioner has been foreclosed from any meaningful opportunity to present her factual basis for establishing why the statute of limitations has not even commenced, let alone run, on her claims. It may very well be that with respect to certain claims which were the subject of the Ninth Circuit decision that Petitioner is barred as a matter of law of the case. That does not, however, preclude her from at least

Complaint below is predicated and it is upon that point which the lower court did not address itself.

SUMMARY.

Petitioner has pursued her claims against the Government in a vigorous and diligent campaign to preserve and protect her personal rights and grievances. She has been resisted with the full might and power of the federal Government, to the effect that she never has been afforded an opportunity to secure a review of any of her factual contentions.

The failure of the Court of Appeals to provide her with an opportunity to orally argue her case has acted to prevent her, once again, from bringing to the attention of the Courts why her rights really do exist, and why it is that she should be afforded an opportunity to present her claims, at least to the extent of receiving a declaration of her rights, one way or the other.

And, it is not only Petitioner's rights which are involved in this matter. The questions which she is trying to present are of evident importance to thousands of public employees throughout the nation employed by approximately 2700 public housing authorities pursuant to federal statute. It is a matter of great public importance to assure public housing employees full protection of the law when their individual rights are affected when the federal Government exercises its statutory right of possession.

The two significant issues raised in this Petition are each of fundamental importance to our system of justice in enabling access by the citizens of this nation to our courts. The first concerns itself with a basic concept of fairness and equal dealing between persons coming before the Federal

Courts of Appeals, and of laws which are disregarded by the courts, themselves.

The second is one of fundamental concepts of fair play. All that is asked is for an opportunity, after fifteen years of diligent effort, to have a trial court look at the facts, before acting to dismiss, and to apply the same rules of law to Petitioner as would be applicable to any other litigant with respect to the rules to be applied on motion to dismiss a complaint.

For the reasons stated, Petitioner respectfully prays that this Petition be granted.

Respectfully submitted,

LAWRENCE H. EISENBERG LAW CORPORATION,

By LAWRENCE H. EISENBERG,

Attorneys for Petitioner.

APPENDIX I.

Judgment.

United States Court of Appeals, for the District of Columbia Circuit.

Alice Miller, Appellant v. Patricia Roberts Harris, in her official capacity as Secretary of the Department of Housing and Urban Development, *et al.* No. 79-1068. September Term, 1979, Civil Action No. 78-1152.

Filed: Dec. 10, 1979.

Appeal from the United States District Court for the District of Columbia.

Before: WRIGHT, Chief Judge, ROBB, Circuit Judge, and CORCORAN,* Senior District Judge.

This cause came on for consideration on the record on appeal from the United States District Court for the District of Columbia and briefs were filed herein by the parties. For the reasons stated in the attached memorandum, it is

ORDERED and ADJUDGED by this court that the judgment of the District Court appealed from in this cause is hereby affirmed.

Per Curiam,
For the Court,
/s/ George A. Fisher,
George A. Fisher,
Clerk.

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*Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. §294(b) (1976).

MEMORANDUM

Appellant was fired from her job with the Housing Authority of Los Angeles (operated by the United States Department of Housing, and Urban Development) in June 1965. She alleges that her discharge was unlawful under 42 U.S.C. §§1981, 1983, 1985 (1976) and 28 U.S.C. §§2201, 2202 (1976) because it was based on her race, gender, and religion. Her discharge was reviewed and affirmed administratively by the Board of Commissioners of the agency in 1966. She filed suit in the Superior Court of Los Angeles County in September 1966, seeking reinstatement and a right to appeal her discharge in accordance with agency regulations, but the court ruled against her. She did not appeal.

In 1971 appellant filed suit in the United States District Court for the District of Columbia. The case was transferred to the Central District of California, where it eventually was dismissed as barred by the statute of limitations (three years in California). The order of dismissal was affirmed by the Ninth Circuit, which explicitly held that the statute had not been tolled by the conduct of the federal defendants.

The present suit was filed in January 1978 in the District Court. It was dismissed as barred by the statute of limitations (three years in the District of Columbia). This court must affirm, because her twelve-year delay in bringing the suit plainly exceeds the statute of limitations, unless the statute was tolled. We agree with the Ninth Circuit that the defendants' actions did not toll the statute; in any event, this question is *res judicata*. The judgment under review is *Affirmed*.

APPENDIX II.

Order.

United States Court of Appeals for the District of Columbia Circuit.

Alice Miller, Appellant v. Patricia Roberts Harris, in her official capacity as Secretary of the Department of Housing and Urban Development, et al. No. 79-1068. September Term, 1979.

Filed: Jan. 21, 1980.

Before: Wright, Chief Judge; Robb, Circuit Judge; and Corcoran*, Senior Judge, United States District Court for the District of Columbia.

Upon consideration of appellant's (Miller) petition for rehearing, it is

ORDERED, by the Court, that appellant's aforesaid petition for rehearing is denied.

Per Curiam,
FOR THE COURT:
/s/ George A. Fisher
GEORGE A. FISHER
Clerk

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*Sitting by designation pursuant to Title 28 U.S.C. §294(c).

APPENDIX III.

Memorandum.

United States Court of Appeals, for the Ninth Circuit.

Alice Miller, Plaintiff-Appellant, vs. George W. Romney, Secretary, Department of Housing & Urban Development; Walter A. Simon, in his official capacity as HUD in Possession Housing Authority of the City of Los Angeles; Robert F. Johnson, Officer, Department of Housing & Urban Development; Housing Authority of the City of Los Angeles, Department of Housing & Urban Development, Defendants-Appellees. No. 73-2686.

[March 17, 1975].

Appeal from the United States District Court for the Central District of California.

Before, VAN OOSTERHOUT,* BARNES, and HUFSTEDLER, Circuit Judges.

Plaintiff appeals from a decision of the district court alternatively (1) dismissing her civil rights action for failure to state a claim for relief and for lack of jurisdiction and (2) granting summary judgment for defendants. We reserve.

In February 1963, plaintiff was hired by the Housing Authority of the City of Los Angeles ["HACLA"] as a stenographic-secretary. In April 1963, pending the resolution of financial difficulties, HACLA was placed in possession of the Public Housing Administration, a federal agency, which subsequently became the Department of Housing and Urban Development ["HUD"]. Two years later, in June 1965, plaintiff was fired by her supervisor, Jesse Spray; the reasons given for her dismissal were "[i]nsubordination, inattention or dereliction of duty, dis-

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*Honorable Martin D. Van Oosterhout, Senior Judge, Eighth Circuit, sitting by designation.

courteous treatment of fellow employees, unwillingness to cooperate in the overall operations of the office, and evident discontent with work assignment." In an affidavit before the district court, plaintiff claims that Spray told her, on June 16, 1965, that he discharged her because he had been hurt by her alleged statement, reported to him by another HACLA employee, that Spray was anti-semitic.

Pursuant to HACLA personnel regulations, plaintiff sought to appeal her discharge to the Acting Executive Director of HACLA, Robert Johnson, an employee of HUD. Johnson disclaimed authority to review her dismissal on the ground that he was merely the *Acting* Executive Director. Eventually plaintiff was permitted to take her appeal to the Board of Commissions of HACLA, who upheld her firing.

In September 1966, plaintiff sued HACLA in the Superior Court of the County of Los Angeles. Apparently she sought reinstatement and the opportunity to appeal her discharge in strict accord with the procedure provided by HACLA personnel regulations. The Superior Court ruled against her, and she ultimately abandoned her appeal from that ruling. On January 20, 1971, she commenced the instant action.

Plaintiff's *pro se* complaint is confusing, but we discern at least four possible claims for relief. Plaintiff contends that (1) Spray fired her because she is Jewish, female, and white; (2) Johnson and the Board of Commissioners of HACLA deprived her of her full right of appeal, as set out in the relevant personnel regulations, because she is Jewish, female, and white; (3) the hearing conducted by the Board of Commissioners was unfair and discriminated against her as a white female Jew; and (4) various members of HACLA and HUD conspired to deny her the equal protection of the laws. She asks for damages based on lost earnings and suffering and seeks restoration of her right of appeal.

The district court, apparently misled by her inartfully drawn complaint, concluded that she failed to state any claim for relief and that the court lacked jurisdiction over the cause. Plaintiff's first, second, and third complaints are cognizable under 42 U.S.C. §1983 and 28 U.S.C. §1343(3); her fourth claim is cognizable under 42 U.S.C. §1985(3) and 28 U.S.C. §1343(1), (2). Plausibly, Spray (an employee of HACLA) and the Board of Commissioners of HACLA—and possibly even HUD employee Johnson, as Acting Executive Director of HACLA—were acting under color of state law. Plaintiff's claims, to the extent they involve alleged discrimination based on race may also be cognizable under 42 U.S.C. §1981 and 28 U.S.C. §1343(3). (*Cf. Bowers v. Campbell* (9th Cir. 1974) ... F.2d ...)

Alternatively, the district court granted summary judgment for defendants on several issues. First, the court held that plaintiff's claims were barred by laches. The doctrine of laches is inapplicable The statute of limitations, not laches, governs the period during which an action for legal and equitable relief may be maintained under the Civil Rights Acts. (*E.g., Mizell v. North Broward Hospital District* (5th Cir. 1970), 427 F.2d 468, 469; *Madison v. Wood* (6th Cir. 1969), 410 F.2d 564, 567; *Swan v. Board of Education of City of New York* (2d Cir. 1963); 319 F.2d 56, 59-60 & n.5; *cf. Morgan v. Koch* (7th Cir. 1969), 419 F.2d 993, 996; *Donovan v. Reinbold* (9th Cir. 1970), 433 F.2d 738; *Smith v. Cremins* (9th Cir. 1962), 308 F.2d 187.) The statute of limitations question was not presented below; accordingly, we do not reach it.

Second, the court ruled that plaintiff's claims were foreclosed by the doctrines of bar and collateral estoppel. Bar is inapplicable because the requisite identity of parties is lacking. As far as we can ascertain, the record before the district court did not contain the record of the state court

action. In this situation, neither the district court nor we can decide whether any issue actually litigated and necessarily decided in the state case is dispositive of any controlling issue in plaintiff's civil rights action.

Third, the district court concluded that there is no genuine issue as to any material fact. The "affidavits" filed in support of the summary judgment motion manifestly violated Rule 56(e), Federal Rules of Civil Procedure. (*United States v. Dibble* (9th Cir. 1970) 429 F.2d 598.) But even if we could overlook these deficiencies, they did not meet the material factual issues and could not dissipate them.

Reversed and remanded for further proceedings consistent with the views herein expressed.

APPENDIX IV.

Memorandum.

United States Court of Appeals, for the Ninth Circuit.

Alice Miller, Appellant, vs. Patricia Roberts Harris,* Secretary, Department of Housing & Urban Development, et al., Appellees. No. 75-2758.

Filed: Feb. 24, 1977.

Appeal from the United States District Court for the Central District of California.

Before: MERRILL, ELY, and CHOY, Circuit Judges.

Miller brought this civil rights action in 1971, alleging that her dismissal as an employee of the Housing Authority of the City of Los Angeles in 1965 was based on her race, sex, and religion. The District Court originally granted summary judgment for the defendants in several grounds. That judgment was reversed by our court in a memorandum decision. On remand the defendants filed another motion for summary judgment, insisting that the suit was barred by the statute of limitations. That motion was granted, and Miller again appeals.

The only issue here presented is whether the District Court erred as a matter of law in granting the motion for summary judgment. We hold that it did not. The applicable statute of limitations is a California statute, prescribing a three-year period for statutory actions. CAL. CIV. PRO. CODE 338(1) (West 1954). *See Smith v. Cremins*, 308 F.2d 187 (9th Cir. 1962). Since Miller's cause of action accrued in 1966, her

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*George W. Rommey, one of the original appellees, was the Secretary of the Department of Housing and Urban Development at the time of the institution of the suit. The present Secretary is Patricia Roberts Harris and, pursuant to Rule 43(c), Fed. R. App. P., she, in her official capacity, is substituted for former Secretary Romney as an appellee.

complaint revealed on its face that her claim was barred unless she could demonstrate some basis for tolling the statute.

Miller first argues that the statute never began to run in the first place because she was unable to exhaust her administrative remedies. The illogical import of this argument is that if we should hold her claim not to have ripened because of failure to exhaust administrative remedies, we would be forced to dismiss her action. Manifestly, the Government may not deny a litigant access to the courts by the simple expedient of denying to the claimant all rightful accesses to appropriate administrative remedies. Therefore, when it became obvious that the Government would accord Miller no further administrative relief, she was obliged to file her lawsuit without delaying for a period of an additional five years.

Miller next contends that the Government is estopped to assert the statute of limitations because it knowingly misled her in respect to her alleged right to relief. The short answer to this argument is that the record abundantly indicates that Miller never relied upon the statements claimed to have been made by government representatives. Rather, she continually pressed for an informal answer to her grievance. *See United States v. Lazy FC Ranch*, 481 F.2d 985 (9th Cir. 1973).

AFFIRMED.

APPENDIX V.

Notice to Counsel.

United States Court of Appeals, for the District of Columbia Circuit, Washington, D.C. 20001.

October 26, 1979.

IN RE: No. 79-1068—Alice Miller v. Patricia Harris, Sec'y. of HUD, et al.

The above-captioned matter has been scheduled for oral argument on: Monday, December 3, 1979 at 9:30 a.m.

You will be advised by order of the time the Court allots for the argument. You will also be advised by order if the Court elects to dispense with the argument. See Local Rule 11(e).

Your attention is further directed to Rule 12 regarding the number of counsel who may present argument and the apportionment of the time allotted. For purposes of that rule, the term "summary calendar" means an allotment of fifteen (15) minutes to each side. Consolidated cases are considered to be one case for the purpose of allotment of argument times.

All requests for postponement of argument based upon facts presently known to counsel should be submitted *by motion* immediately on receipt of this notice.

NOT LESS THAN TWO (2) DAYS IN ADVANCE OF ARGUMENT, THIS OFFICE MUST BE INFORMED OF THE NAME OR NAMES OF COUNSEL WHO WILL PRESENT THE ARGUMENT. THE FORM PROVIDED BELOW IS FOR YOUR CONVENIENCE IN PROVIDING THIS INFORMATION.

Very truly yours,
GEORGE A. FISHER, Clerk,
By: /s/ Patricia L. Krosel
Patricia L. Krosel,
Deputy Clerk,

NOTICES TO:

Alice Miller,
126½ South Wetherly Drive,
Los Angeles, California 90048.

John A. Terry,
Assistant US Attorney,
US Courthouse,
Washington, D.C. 20001.

APPENDIX VI.

Order.

United States Court of Appeals, for the District of Columbia Circuit.

Alice Miller, Appellant v. Patricia Roberts Harris, in her official capacity as Secretary of the Department of Housing and Urban Development, et al. No. 79-1068. September Term, 1979, Civil Action No. 78-1152.

Filed: Nov. 19, 1979. Calendared for 12-3-79.

This matter is before the Court for consideration of appellant's motion for leave to bring attorney of record. The purpose of this motion is not clear to the Court. If appellant desires to hire counsel to represent her, she, of course, has that right and counsel may appear on her behalf at argument provided that the appearance of counsel is entered no later than five days prior to the date set for the argument.

FOR THE COURT:
George A. Fisher,
Clerk,
By: /s/ Robert A. Bonner,
Robert A. Bonner,
Chief Deputy Clerk.

APPENDIX VII.

Order.

United States Court of Appeals, for the District of Columbia Circuit.

Alice Miller, Appellant v. Patricia Roberts Harris, in her official capacity as Secretary of the Department of Housing and Urban Development, et al. No. 79-1068. September Term, 1979, Civil Action No. 78-1152. Calendared for 12/3/79.

Filed: Nov. 23, 1979

On consideration of the record, the briefs, and all of the pleadings and proceedings had herein, and it appearing that the above case falls within the intent and purpose of Rule 11(d) of the General Rules of this Court and also meets one or more of the criteria set forth in that rule, it is

ORDERED by the Court, *sua sponte*, that the above case presently scheduled for argument on December 3, 1979 will be considered and decided without oral argument.

Counsel will be notified at a later date of the division of the Court considering this matter.

For The Court:
GEORGE A. FISHER, Clerk,
By: /s/ Daniel M. Cathey
Daniel M. Cathey
First Deputy Clerk

APPENDIX VIII.

§46. Assignment of Judges; Divisions; Hearings; Quorum.

(a) Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs.

(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs.

(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof.

(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum.

As amended Nov. 13, 1963, Pub.L. 88-176, §1(b), 77 Stat. 331.

Rule 34. Oral Argument.

(a) *Notice of Argument; Postponement.* The clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed reasonably in advance of the date fixed for hearing.

(b) *Time Allowed for Argument.* Unless otherwise provided by rule for all cases or for classes of cases, each side will be allowed 30 minutes for argument. If counsel is of the opinion that additional time is necessary for the adequate presentation of his argument, he may request such additional time as he deems necessary. Requests may be made by letter addressed to the clerk reasonably in advance of the date fixed for the argument and shall be liberally granted if cause therefor is shown. A party is not obliged to use all of the time allowed, and the court may terminate the argument whenever in its judgment further argument is unnecessary.

(c) *Order and Content of Argument.* The appellant is entitled to open and conclude the argument. The opening argument shall include a fair statement of the case. Counsel will not be permitted to read at length from briefs, records or authorities.

(d) *Cross and Separate Appeals.* A cross or separate appeal shall be argued with the initial appeal at a single argument, unless the court otherwise directs. If a case involves a cross-appeal, the plaintiff in the action below shall be deemed the appellant for the purpose of this rule unless the parties otherwise agree or the court otherwise directs. If separate appellants support the same argument, care shall be taken to avoid duplication of argument.

(e) *Non-Appearance of Parties.* It the appellee fails to appear to present argument, the court will hear argument on behalf of the appellant, if present. If the appellant fails to appear, the court may hear argument on behalf of the appellee, if his counsel is present. If neither party appears, the case will be decided on the briefs unless the court shall otherwise order.

(f) *Submission on Briefs.* By agreement of the parties, a case may be submitted for decision on the briefs, but the court may direct that the case be argued.

(g) *Use of Physical Exhibits at Argument; Removal.* If physical exhibits other than documents are to be used at the argument, counsel shall arrange to have them placed in the court room before the court convenes on the date of the argument. After the argument counsel shall cause the exhibits to be removed from the court room unless the court otherwise directs. If exhibits are not reclaimed by counsel within a reasonable time after notice is given by the clerk, they shall be destroyed or otherwise disposed of as the clerk shall think best.

Rule 47. Rules by Courts of Appeals.

Each court of appeals by action of a majority of the circuit judges in regular active service may from time to time make and amend rules governing its practice not inconsistent with these rules. In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules. Copies of all rules made by a court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Courts.

Rule 11. Calendaring Cases.

(a) *Clerk to Prepare Calendar.* The Clerk shall prepare calendars of cases for the regular sessions of this Court, placing thereon, in proper numerical order, only cases in which the briefs upon both sides have been filed or will be due 7 days before the beginning of the session, unles otherwise ordered by the Court.

(b) *Advancement of Date for Hearing.* The Court may, on motion or sua sponte, advance the date for the hearing of any case, motion or petition, and may allow the filing of typewritten, mimeographed or photocopied briefs, in lieu of printed briefs, in cases advanced for hearing.

(c) *Continuance of Hearing*. When a case has been set for hearing, it may not be continued by stipulation of the parties or their counsel, but only by an order of the Court on a motion promptly filed and for good cause shown.

(d) *Summary Calendar*. Whenever the Court, sua sponte or on suggestion of a party, concludes that a case is of such character as not to justify extended oral argument, the case may be placed on the summary calendar. No separate summary calendar will be maintained. Cases will be placed on the summary calendar by the Clerk, pursuant to directions from the Court. Such cases may or may not be heard on days set for oral argument of cases not on the summary calendar.

(e) *Disposition Without Oral Argument*. Whenever the Court, sua sponte or on suggestion of a party, concludes that a case is of such a character as not to justify oral argument, it may, after causing notice to be given by the Clerk to the parties of that determination, proceed to dispose of the case without such argument. Motions for restoration to the argument calendar will not ordinarily be granted by the court.

Chapter 161—United States as Party Generally.

§*2401. Time for commencing action against United States.*

(a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate

Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

As amended Nov. 1, 1978, Pub.L. 95-563, §14(b), 92 Stat. 2389.

Code of Civil Procedure §338(1).

§*338. Three years; statutory liability, exception; trespass or injury to realty; taking, detaining or injuring goods or chattels; fraud or mistake; bond of public official; notary public, additional time, maximum limit; slander of title; false advertising*

Within three years:

1. An action upon a liability created by statute, other than a penalty or forfeiture.

* * *

(Amended by Stats. 1972, C. 823, p. 1469, §2.)

APPENDIX IX.

Memorandum of Opinion.

United States District Court for the District of Columbia.

Alice Miller, Plaintiff, v. Patricia Roberts Harris et al., Defendants. Civil Action No. 78-1152.

Filed: Sep. 26 1978.

This action comes before the Court upon defendants' motion to dismiss. Upon consideration of the pleadings filed in this action, it is the judgment of this Court that defendants' motion should be granted.

In 1965, plaintiff, a white female of the Jewish community in Los Angeles, California, was discharged from her position as a stenographic secretary for the Housing Authority of the City of Los Angeles (HACLA). HACLA is a subsidiary of the defendant Department of Housing and Urban Development (HUD). After hearings before the Board of Commissioners of HACLA upholding plaintiff's discharge, plaintiff filed suit in the California Superior Court of the County of Los Angeles and there alleged that her discharge deprived her of her Fifth Amendment rights of due process and her First Amendment right to religious freedom under the Constitution of the United States. The Superior Court ruled against the plaintiff and, on June 29, 1967, the plaintiff abandoned her appeal of that decision. On January 20, 1971, plaintiff filed suit in the District Court for the District of Columbia. Judge Gasch of this Court transferred the suit to the United States District Court for the Central District of California. There the plaintiff asserted that her discharge was the result of discrimination on the basis of sex and religion and that she was deprived of her right to be heard under the Due Process clause. Upon consideration of a motion for summary judgment, the California District Court dismissed the action for failure to state a claim

or, in the alternative, concluded that the action was barred by the equitable doctrines of laches and estoppel. The Ninth Circuit reversed and remanded the action reasoning, *inter alia*, that the statute of limitations rather than the doctrine of laches is applicable to plaintiff's cause of action. On remand, the California District Court again dismissed the suit, holding that the plaintiff's action was barred by section 338(1) of the California Code of Civil Procedure, the local three-year statute of limitations. *Miller v. Romney*, Docket No. 71-2981-CC (C.D. Cal. 1975). The Ninth Circuit affirmed concluding that plaintiff's complaint revealed on its face that her claim was barred and that plaintiff had failed to demonstrate any basis for tolling the statute of limitations. *Miller v. Harris*, Docket No. 75-2758 (9th Cir. February 24, 1977), *cert. denied*, 46 U.S.L.W. 3526 (U.S. February 21, 1978).

The plaintiff prays now that we vacate the California District Court's decision and that we consider her original claim. The District of Columbia statute of limitations applicable to this action and principles of collateral estoppel, however, preclude this Court from entertaining plaintiff's request.

This Court acknowledges the principle that a judgment in favor of the defendants on a plea of the statute of limitations is not a judgment on the merits to which the doctrine of res judicata applies when, as in this case, the statute of limitations bars only the remedy and does not destroy the federal cause of action. *Williamson v. Columbia Gas & Electric Corp.*, 186 F.2d 464, 466 (3d Cir. 1950), *cert. denied*, 341 U.S. 921 (1951); *Liken v. Shaffer*, 141 F.2d 877, 882 (8th Cir. 1944), *cert. denied*, 323 U.S. 756 (1944). To the extent that issues were actually adjudged, however, the California decisions are binding upon this Court. We are persuaded that, although we are free to apply the District

of Columbia's statute of limitations to this action, we are not free to toll the statute as plaintiff requests. That issue has been fully litigated and adjudged by courts of competent jurisdiction. *Hall v. Tower Land and Investment Co.*, 512 F.2d 481 (5th Cir. 1975).

The District of Columbia's general statute of limitations provides that an action be filed within three years of tha accrual of the cause of action. D.C. Code § 12-301 (West 1966). The California District Court decided, and the Ninth Circuit agreed, that plaintiff's action ripened in 1966 and that the plaintiff had failed to present cause for tolling the local statute. Accordingly, this action is barred by the District of Columbia statute of limitations.

An Order consistent with this opinion has been entered this day.

/s/ (John H. Pratt)
John H. Pratt,
United States District Judge.

September 26, 1978.